European Court of Human Rights: *Gümüş v. Türkiye*

IRIS 2024-9:1/24

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The European Court of Human Rights (ECtHR), in a judgment of 9 July 2024, found a violation by the Turkish authorities of the right to freedom of expression of political speech via social media as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The case concerns the conviction of Mr Suphi Gümüş resulting in a prison sentence combined with a measure of suspension of the pronouncement of the judgment on account of content he posted on Facebook. Referring to its judgment in the case of *Durukan and Birol v. Türkiye* (IRIS 2023-10:1/22) the ECtHR found that the interference with Gümüş' rights under Article 10 ECHR did not afford the requisite protection against arbitrary abuse by the public authorities. Most importantly, the ECtHR rejected the Turkish Government's claim under which Gümüş' posts on Facebook could not be protected by Article 10 ECHR because the impugned posts fell within the ambit of the abuse clause of Article 17 ECHR.

By an indictment in January 2018, the Şanlıurfa Public Prosecutor charged Gümüş with dissemination of propaganda in favour of a terrorist organisation, due to certain content he had published on his Facebook account. The posts referred, *inter alia,* to the PKK, the Kurdistan Workers' Party and to the YPG which, according to the Turkish authorities, is a branch of the PKK, an illegal armed organisation. A few months later the Şanlıurfa 5th Assize Court convicted Gümüş and sentenced him to one year, two months and sixteen days in prison. The Assize Court considered that some of Gümüş' posts on Facebook supported and encouraged the methods of violence of the PKK and its members and that they constituted the offence of dissemination of propaganda in favour of a terrorist organisation, pursuant to Article 7, subsection 2 of Law No. 3713 (Anti-Terrorism Law). Applying Article 231 of the Code of Criminal Procedure, the Assize Court decided, however, to suspend the pronouncement of the judgment and to subject Gümüş to three years' supervision. Gümüş' opposition to this decision and a further appeal with the Turkish Constitutional Court was dismissed. He lodged a complaint with the ECtHR under Article 10 ECHR that he had been convicted for sharing content on Facebook.

As a preliminary objection, the Turkish Government alleged that the impugned posts on Facebook glorified and legitimised violent acts and that they ran counter to the text and spirit of the Convention, within the meaning of Article 17 ECHR. They therefore argued that the application was incompatible *ratione materiae* with the provisions of the ECHR. The ECtHR however found that the content of the

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impugned posts on Gümüş' Facebook account did not reveal an intent to undermine Convention rights. Notwithstanding the controversial nature of the posts published on Facebook expressing praise for the leader of the PKK and glorifying the PKK or the YPG, the ECtHR considered that the litigious posts for which Gümüş was convicted did not appear to be an incitement to destroy the Convention rights and freedoms. Therefore it concluded that Gümüş' application did not constitute an abuse of rights under Article 17 ECHR and that Gümüş was therefore entitled to the protection of Article 10 ECHR (compare *Lenis v. Greece*, IRIS 2023-9:1/21 and *Sokolovskiy v. Russia*, IRIS 2024-7:1/19). On the merits of the case, the Turkish Government claimed that there had been no interference with Gümüş' freedom of expression, emphasising the absence of any conviction added to his criminal record due to the application of the measure of suspension of the pronouncement. Hence there were no negative legal consequences or deterrent effects caused by the criminal proceedings and his conviction. The ECtHR however found that Gümüş' criminal conviction with suspension of pronouncement of the judgment, which subjected him to a period of supervision of three years amounted, in view of the deterrent effect it may have had, to an interference with Gümüş' exercise of his right to freedom of expression. The ECtHR referred to the deficient legal basis for the suspension of the prison sentence and to the potential chilling effect of such a probation measure. Referring to its finding in *Durukan and Birol v. Türkiye* and the absence of adequate procedural safeguards to regulate the discretion granted to the domestic courts in applying the suspension of prison sentences, the applicable legal basis did not afford the requisite protection against arbitrary abuse by the public authorities of the rights guaranteed under the ECHR. The interference with Gümüş' right to freedom of expression was thus not "prescribed by law" for the purposes of Article 10, paragraph 2 ECHR. This finding was sufficient to enable the ECtHR to conclude that there had been a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Second Section sitting as a Committee, in the case of Gümüş v. Türkiye, Application No. 44984/19, 9 July 2024

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